United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Orig w/ appendant & mailing

76-6162

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6162

LOIS HOPE SMALL and VEDA MAY POULSON also known as GORDON,

Plaintiffs-Appellees,

—against—

MAURICE F. KILEY, District Director, United States Immigration and Naturalization Service; and LEONARD P. CHAPMAN, Commissioner, Immigration and Naturalization Service,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
RICHARD P. CARO,
Assistant United States Attorneys,
Of Counsel.

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Supplement to Statement of the Case *

Plaintiffs'-appellees' brief cites to several statements of fact in the defendants'-appellants' brief as being erroneous on the basis of information not in the record.

* The two affidavits of Leon Rosen included in the Joint Appendix were inadvertently bound in the wrong order. Thus, the affidavit which is indicated in the Table of Contents of the Joint Appendix as appearing on pages A-14 to A-16 actually appears on pages A-18 to A-21, and vice-versa for the second Rosen affidavit. The Joint Appendix page references to these affidavits in the Brief for Defendants-Appellants are incorrect for this reason.

The first criticism is directed at the characterization of Ms. Poulson's remaining in the United States since 1964 as being unlawful. The complaint states that Ms. Poulson entered the United States as a tourist on August 2, 1964, and has remained here ever since. No averment is made that her continued presence in the country after expiration of her tourist visa was lawful in whole or in part, and the Government's characterization of this continued presence as being "illegal" [1] remained, during the course of the proceedings below, unrebutted.[2]

The other alleged misstatement of facts concerns the reasons for the INS investigation concerning the daughter-mother relationship between Ms. Small and Ms. Poulson. Although district counsel for INS, Nina R. Cameron, stated in an affidavit (A. 22-23) that there was a discrepancy concerning the correct name of Ms. Small's mother, both in her affidavit and at the district court

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[1] *See, e.g.*, Defendants' Memorandum of Law In Support of Their Application To Stay Depositions And To Dismiss The Complaint at 10.

[2] In addition, facts outside the district court record and available to the Government indicate that Ms. Poulson initially without permission remained in the country after expiration of her temporary visa on October 16, 1964. She was subsequently granted several extensions of the time within which to voluntarily depart, but never departed. Her last extension expired in 1970. Ms. Poulson was granted three extensions in connection with her 1966 application for a change of status based upon her marriage to a United States citizen, William H. Poulson, who subsequently in an affidavit denounced the marriage, stated that they had never lived together as man and wife and refused to support a visa petition for her. Mr. Poulson's sworn statements not only indicated that the marriage may have been a sham but that certain statements made by Ms. Poulson to I.N.S. may have been false and misleading. Subsequently in January 1976, Ms. Poulson withdrew her application for a change of status based upon her marriage to William H. Poulson.

hearing, Ms. Cameron indicated generally the existence of additional discrepancies which under the circumstances required further investigation and the acquisition of certain documents.[3] Accordingly, the district court refused to calendar Ms. Small's application for naturalization prior to completion of the INS investigation, and an appeal from this determination was not made by plaintiffs-appellees.

Finally, plaintiffs-appellees now recharacterize their action as principally intended to compel the expedition of Ms. Small's naturalization. However, although only a single claim is alleged in the complaint, it is clear from the face of the pleadings[4] and from the subsequent proceedings below[5] that the principal injury alleged was the alleged refusal to defer and delay the deportation hearing and the principal relief sought was the staying of the deportation proceedings. Indeed, the Motion to Calendar For Naturalization, was made in connection with a separate proceeding entitled, "In The Matter of The

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[3] Again facts outside the district court record indicate, for example, that in addition to the discrepancy concerning the first name of Ms. Small's mother, in her 1968 application for admission Ms. Small stated that like herself her mother was then residing in Kingston, Jamaica. Plaintiff-appellee, Ms. Poulson, however, at the time had been residing in the United States for approximately two years. Also, although Ms. Small's INS file does contain a birth certificate, this is not the only document that is being sought.

[4] See the Eighth, Ninth and Tenth Paragraphs of the Complaint (A. 4-5). Also the prayer for relief (A-6) asks first for restraining of the deportation proceedings and second for directing INS to process forthwith the naturalization application.

[5] In the proceedings below plaintiff-appellees principally directed their efforts to having the deportation proceedings adjourned or stayed. See, *e.g.*, ¶¶ 5-7 of the Affidavit of Richard P. Caro at A. 8-10.

Petition for Naturalization of Lois Hope Small." Service of the motion papers was not made upon the United States Attorney, the defendants' attorney herein, but only upon the local district Naturalization office.[6] Surely, if the principal purpose of the complaint was to expedite the naturalization process the motion to calendar should have been made in the action instituted by the complaint and the motion papers served upon the undersigned.[7]

Thus, contrary to plaintiffs'-appellees' recharacterization of the action below, this suit was initiated principally to avoid having Ms. Poulson submit to the administrative process and to avoid having the agency determine her deportability for as long as possible.

REPLY ARGUMENT

POINT I

P. L. 94-574 did not amend Section 10 of the A.P.A. to make it a grant of subject matter jurisdiction.

Public Law No. 94-574, 90 Stat. 2721 (1976), was enacted into law on October 21, 1976, and it is contended by plaintiffs-appellees that by this bill Congress amended the Administrative Procedure Act to make it a grant of subject matter jurisdiction. The defendants-appellees disagree. Section 1 of the new law amends 5 U.S.C.

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[6] Copies of these motion papers were first sent by mail by plaintiffs-appellees to the undersigned for inclusion in the Joint Appendix on Appeal.

[7] Even with respect to the naturalization proceedings, plaintiffs'-appellees' attorney admitted in conference that no motion to expedite the proceedings was made to the agency prior to the motion in the district court to calendar the petition.

§§702 and 703 to provide that an action shall not be dismissed on the grounds that it is against the United States or that the United States is an indispensable party and that where no special statutory review proceeding is applicable an action for judicial review may be brought against the United States, the agency or the appropriate agency official.[8]

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[8] Section 1 of Pub. L. 94-574 provides as follows:

"'§ 702 Right of Review

'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States, provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and there successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) conferes authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

'§ 703. Form and venue of proceeding

'The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in court of competent jurisdiction. If no special statutory

[Footnote continued on following page]

Section 2 of P.L. 94-574 amends section 1331(a) of Title 28, the United States Code, to eliminate the $10,000 prerequisite to federal question jurisdiction in an action against the United States, one of its agencies or employees as federal officials.[9]

From the face of these amendments it is clear that Congress did not make the Administrative Procedure Act a grant of subject matter jurisdiction and intended that subject matter jurisdiction be established either under a particular statute or generally under Title 28. (See Brief For Defendants-Appellants at 28-29). Indeed the Senate Report states with respect to the amendments of section 1: "S.800 is not intended to affect or change defenses other than sovereign immunity." S. Rep. No. 94-906, S. Jud. Comm., 94th Cong., 2 Sess. at 11 (1976). The Report, in its comments on the amendment to 28 U.S.C. §1331 (at 14-16), further indicates that the only change in subject-matter jurisdiction intended under the bill was that pertaining to 28 U.S.C. §1331(a).

Finally, it should be noted that Congress did not make the amendments retroactive and thus they cannot be relied upon by plaintiffs-appellees in this case.

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review proceedings is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.'"

[9] Section 2 of Pub. L. 94-574 provides as follows:

"Section 1331(a) of title 28, United States Code, is amended by striking the final period and inserting a comma and adding thereafter the following 'except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employees thereof in his official capacity.'"

POINT II

Ms. Poulson's refusal and failure to make any application for relief before the special inquiry officer does not divest this Court of its exclusive jurisdiction under 8 U.S.C. § 1105a(a).

Plaintiffs-appellees in their brief (at 5-6) contend that since review of a final order of deportation is not being sought, 8 U.S.C. § 1105a(a) is inapplicable, and therefore the matter is not within the exclusive jurisdiction of the Court of Appeals, and, for support, cite *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968). In that case, the Supreme Court held that the district court rather, than the Court of Appeals, had jurisdiction to review a denial of an application for suspension of deportation which was applied for three months after a final order of deportation had been entered (392 U.S. at 211-13):

> "Although *Foti* strongly suggests the result that we reach today, neither it nor *Giova* can properly be regarded as controlling in this situation. Unlike the order in *Foti*, the order in this case was not entered in the course of a proceeding conducted by a special inquiry officer under § 242(b); unlike the order in *Giova* the order here did not deny a motion to reopen such a proceeding * * *
>
> * * * * *
>
> "* * * Thus, the order in this case was issued more than three months after the entry of the final order of deportation, in proceedings entirely distinct from those conducted under § 242(b), by an officer other than the special inquiry officer who, as required by § 242(b), presided over the deportation proceeding. The order here did not involve the denial of a motion to reopen proceedings conducted under § 242(b), or to reconsider any final

> order of deportation. Concededly, the application for a stay assumed the prior existence of an order of deportation, but petitioner did not "attack the deportation order itself but instead [sought] relief not inconsistent with it." *Mui* v. *Esperdy*, 371 F.2d 772, 777 (C.A. 2d Cir.). * * *" (Footnote omitted).

The Court in *Cheng Fan Kwok* v. *INS*, reaffirmed its prior determination in *Foti* v. *INS*, 375 U.S. 217 (1963), in which the Court held that the Court of Appeals rather than the district court had exclusive jurisdiction to review a denial of an application for suspension of deportation made during the course of or incident to section 242(b), 8 U.S.C. § 1252(b) proceedings. The Court in *Foti* explained its decision as follows (375 U.S. at 229):

> "Also, it seems clear that all determinations made during or incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a). * * *"

The Government contends that this holding of *Foti* applies in the case at bar. The proceeding here is a section 242(b) hearing. Prior to the initiation of this suit, Ms. Poulson was served with an order to show cause why she should not be deported. In July 1976 Ms. Poulson's attorney informally requested the special inquiry officer to stay the section 1252(b) proceedings and in response was advised that the special inquiry officer requested the application to be made formally in accord-

ance with regulations. Ms. Poulson, however, never submitted the appropriate application nor sought any other type of discretionary relief.

This failure to submit to the administrative process for whatever reasons is simply insufficient to divest this Court of its otherwise exclusive jurisdiction over the matter and to vest the district court with jurisdiction, for clearly had a stay of the proceedings or suspension of deportation been applied for, the denial of such relief would ultimately have been reviewable by this Court under *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 216-17, and *Foti* v. *INS*, *supra*, 375 U.S. at 229. This is also consistent with Congressional intent. See *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 214-15.

POINT III

The district court does not have subject matter jurisdiction under 28 U.S.C. § 1346(a)(2) because the complaint does not seek a monetary judgment against the United States.

It is apparently plaintiffs'-appellees' contention that since the action does not involve a claim for $10,000 or more, subject matter jurisdiction may be established under 28 U.S.C. § 1346(a)(2). However, it is axiomatic that this jurisdictional provision of the Tucker Act is applicable only where a claim for a monetary judgment against the United States is sought. See, *e.g.*, *Lindy* v. *Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); *Blanc* v. *United States*, 244 F.2d 708, 709 (2d Cir. 1957). Since this is not an action for a monetary judgment, reliance cannot be placed on section 1346(a)(2) to establish subject matter jurisdiction in the district court.

POINT IV

28 U.S.C. § 1331(a) may not be relied upon to establish the jurisdictional basis for the issuance of the injunction.

Based upon the plaintiffs'-appellees' recharacterization of the nature of the action as one which seeks principally to expedite and calendar the naturalization petition of Ms. Small, it is now asserted for the first time that the district court has subject matter jurisdiction of this principal claim under 28 U.S.C. § 1331(a) and ancillary or pendent jurisdiction over the deportation proceedings.

As heretofore shown in Point II of this Reply Brief and in the Government's Brief in chief (at 31-34), 8 U.S.C. § 1105a(a) is the exclusive jurisdictional provision for review of all matters raised during and incident to section 1252(b) deportation proceedings. Similarly, the exclusive jurisdictional provision respecting naturalization proceedings is 8 U.S.C. § 1421. Accordingly, the prerequisites to suit imposed under the provisions of Title 8 obviously cannot be avoided by resort to the general federal question jurisdictional provision of section 1331 (a). See, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 429-31 (1944).

Furthermore, just as exhaustion of administrative remedies is required by 8 U.S.C. § 1105a(c) prior to seeking judicial review under section 1105a, exhaustion of administrative remedies, including submission to a preliminary investigation of the alien seeking to be naturalized, 8 U.S.C. §§ 1443(a) and 1446, is also generally required prior to judicial action on a naturalization petition. *United States* v. *Chandler*, 152 F. Supp. 169, 172-73 (D. Md. 1957). Here Ms. Small's application is still under investigation to clarify certain discrepancies which plaintiffs-appellees had initially refused to explain.

Assuming that the complaint is principally directed to compelling or expediting the calendaring of the naturalization petition, such an action would not only be duplicative of the other proceeding to calendar the petition, but would constitute an improper attempt to avoid the jurisdictional requirements of 8 U.S.C. § 1105a and to by-pass entirely the administrative process as it affects Ms. Poulson. Furthermore, to the extent the doctrines of pendent or ancillary jurisdiction are urged as a jurisdictional basis for the issuance of a preliminary injunction restraining the deportation proceedings, the Court should not sanction the use of the district court's jurisdiction under section 1421 as a way of divesting the Court of Appeals of its exclusive jurisdiction under 8 U.S.C. § 1105a(a).

Clearly, whether the deportation proceedings go forward or not, whether Ms. Poulson is found deportable or not, and whether a stay or suspension of deportation is granted or refused are not matters which affect Ms. Small's right to be naturalized. It is thus questionable whether a district court could exercise ancillary jurisdiction to consider matters relevant to a section 1252(b) proceeding respecting Ms. Poulson which bears no relevancy to the naturalization proceedings. Even on an ancillary jurisdictional basis, then, the district court could not properly enjoin proceedings clearly outside the scope of the matters within its jurisdiction and without relevancy to the issues properly before it. See generally, *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926). Similarly, even assuming that the concept of pendent jurisdiction is applicable, for the reasons stated above pendent jurisdiction could not be properly exercise in this case. See generally, *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966).

However, even if the Court were inclined to hold that ancillary or pendent jurisdiction existed to issue the

injunction, the Court should refrain from doing so in this case because no reason has been presented below or before this Court which justifies the complete failure of plaintiffs-appellees to exhaust readily available administrative remedies. In addition, as the pleadings and proceedings below establish the main purpose of the action was to restrain the initiation and conduct of the deportation hearing rather than to compel the calendaring or expediting of the naturalization petition. The latter matter is clearly subordinate and ancillary to the former and accordingly the Court should hold that the district court's subject matter jurisdiction to restrain the deportation proceedings should be independently established, and if it cannot be, the entire action should be dismissed.

POINT V

28 U.S.C. §1361 may not be relied upon for establishing subject matter jurisdiction.

Plaintiffs-appellees further suggest that mandamus jurisdiction under 28 U.S.C. §1361 exists to vest the district court with jurisdiction over the action. Defendants-appellants disagree.

Generally, mandamus jurisdiction exists only if (1) a clear right exists on the part of the plaintiff to the relief requested, (2) a clear duty exists on the part of the defendant Government officials to do the act in question, and (3) no other adequate remedy is available. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958); *Wilbar* v. *Kadrie*, 281 U.S. 206, 218-19 (1930). Under these standards the writ will not issue unless it plainly appears that the claim is clear and certain, and the duty of the officials is ministerial and so plainly prescribed as to be free from doubt. In the area of agency discretion,

lower courts have held that mandamus jurisdiction may not be invoked unless it appears that the complained of exercise of discretion is well beyond all rational or lawful limits. See, *e.g.*, *Leonhard* v. *Mitchell*, 473 F.2d 709, 712-13 (2d Cir. 1973).

Mandamus jurisdiction may not be properly invoked in this action first because there has been a complete failure to exhaust administrative remedies, see, *e.g.*, *Grant* v. *Hogan*, 505 F.2d 1220, 1225 (3rd Cir. 1974), and second because on the face of the pleadings, no breach of a clear duty or an abuse of discretion well beyond all rational or lawful limits has been alleged. The complaint alleges that the priority directive is unlawful and violative of 8 U.S.C. § 1103. But section 1103 does not, either on its face, or by reasonable interpretation, proscribe the deployment of personnel as long as the personnel are engaged in activities which are within the scope of the agency's responsibilities. Section 1103 merely states:

> "[T]he Attorney General [or the Commissioner whose authority derives from a delegation of powers by the Attorney General] . . . shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such [instructions]; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

Assuming further that Commissioner Chapman directed that agency energies be focused upon the active enforcement of the immigration laws, this clearly is within the lawful scope of his discretion and authority. Also the Court should take judicial notice of the facts that Congress has repeatedly expressed its concern about the large and growing number of illegal aliens in the country

and the need to remedy the situation, and has approved the agency's budget, and that great numbers of individuals are being naturalized in the Eastern District of New York and in other districts.[10] Clearly, then what is sought is the substitution of the court's judgment for that of those charged with the responsibility of how resources and personnel should be utilized. Mandamus jurisdiction is simply not available for such a purpose.

Finally, it should be noted that on the alleged facts it appears that the complaint was filed approximately three months after Ms. Small filed her application for naturalization and that she was entitled to file her application for naturalization three years earlier. It is thus certainly not clear that the three month interval between the filing of the application and the initiation of the law suit constituted any breach of any duty owed her.

For these reasons this is not a proper case for the exercise of mandamus jurisdiction under 28 U.S.C. § 1361.

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[10] At a conference before Judge Neaher, an INS official represented that in 1975 approximately 20,000 persons were naturalized in the Eastern District of New York alone and that this represented a substantial increase over prior years. Indeed public records in the United States District Court for the Eastern District of New York indicate that in 1975 19,059 persons were naturalized while in 1974 and 1973, the number of persons naturalized were 14,037 and 9,798 respectively.

POINT VI

8 U.S.C. § 1329 may not be relied upon to establish subject matter jurisdiction.

Plaintiffs-appellees refer to, but do not assert, 8 U.S.C. § 1329 as a jurisdictional basis for this action. Defendants-appellants disagree because section 1329, in light of the other jurisdictional provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1105a and 1421, and in view of its long legislative history, is solely directed to authorizing enforcement actions by the United States where there have been violations of the immigration and naturalization laws.

On its face section 1329 appears to conflict with the jurisdictional provisions of sections 1105a and 1421, and with the long history of reliance upon habeas corpus jurisdiction by aliens seeking review of INS actions prior to the enactment of section 1105a. Furthermore, section 1329 is situated in the midst of the general penalty provisions of the Act and other than the first sentence of section 1329, the remainder of the section is expressly concerned with actions brought by the United States for violations of the Act. Since no other provision of the Act is concerned with the jurisdiction for enforcement actions it is clear that section 1329 is directed solely to defining by whom and in what forum such actions may be initiated.

This construction of section 1329 is supported by and consistent with its legislative history. The statute as it now exists is a composite of various antecedent predecessor statutes. The language of the first sentence of section 1329 which states that "the district courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal, arising under any of the

provision of this Act," is ultimately derived from the Immigration Act of 1891, ch. 551, § 13, 51st Cong. 2d Sess., 26 Stat. 1086, which provided:

> " * * * [T]hat the circuit and district courts of the United States are hereby invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act. * * * "

The purpose of the provision was to encourage resort to the federal courts in the area of enforcement proceedings. See H.R. Rep. No. 3472, 51st Cong., 1st Sess. at 3 (1890). Under various provisions such enforcement proceedings against certain violations could have been initiated in state courts which had jurisdiction to naturalize aliens.[11] See, *e.g.*, Act of July 6, 1798, ch. 66, § 2, 5th Cong., 2d Sess., 1 Stat. 577-78 (authorizing enforcement actions against enemy aliens); Act of July 4, 1864, ch. 246, 38th Cong., 1st Sess., 13 Stat. 385-86, Act of March 3, 1875, ch. 141, §§ 3-5, 43rd Cong., 2d Sess., 18 Stat. 477-78 and the Act of February 26, 1885, ch. 164, § 3, 48th Cong., 2d Sess., 23 Stat. 333 (authorizing enforcement actions against contracts to import labor); Act of July 14, 1870, ch. 254, § 4, 41st Cong., 2d Sess., 16 Stat. 255 (authorizing enforcement actions against certain offenses such as false representation of citizenship, false affidavits); Act of July 5, 1884, ch. 220, § 12, 48th Cong., 1st Sess., 23 Stat. 17 (authorizing the deportation of certain aliens). Also previously certain enforcement actions could have been initiated by any person. For example, under section 3 of the Act of February 26, 1885, *supra*, any person could

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[11] From time to time Congress has specified the state courts which may naturalize persons. *See, e.g.*, the Act of March 26, 1790, ch. 13, 1st Cong., 2d Sess., 1 Stat 103; the Act of April 14, 1802, ch. 28, §3, 7th Cong., 1st Sess., 2 Stat. 155; the Act of February 1, 1876, ch. 5, 44th Cong., 1st Sess. 19 Stat. 2.

institute an enforcement action against and recover any fine imposed upon a violator of the provision prohibiting the import of aliens under labor contracts. Upon the 1891 codification of the immigration laws the various provisions respecting violations and penalties were brought together, and section 13 authorizing general federal enforcement jurisdiction was enacted.

The immigration laws underwent major recodifications in 1903 and in 1917. Section 13 of the Immigration Act of 1891 was retained as section 29 of the Act of March 3, 1903, ch. 1012, 57 Cong., 2d Sess., 32 Stat., 1220, and as section 25 of the Immigration Act of 1917, 64th Cong., 2d Sess., 39 Stat. 893. Section 25, from which the present provision immediately derives, was intended to codify not only section 29 but also sections 5 and 27 [12] of the Act of March 3, 1903, and to restate the existing law under these provisions. See S. Rep. No. 352, 64th Cong., 1st Sess., at 18 (1916).

For the above reasons section 1329 may not be relied upon to establish subject matter jurisdiction in the case at bar.

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[12] Section 5 of the Act of March 3, 1903 is a modified version of section 3 of the Act of February 26, 1885, *supra*, which allowed anyone to bring an enforcement action against a violator of the prohibition against contracts to import labor. The 1903 modification authorized only the United States attorneys to institute such actions. Section 27 is almost a verbatim version of section 2 of the Immigration Act of 1891, *supra*, which dealt with judicial control over the dismissal, compromise or settlement of enforcement actions.

POINT VII

No justification exists for failure of the plaintiffs-appellees to exhaust their administrative remedies.

Plaintiffs-appellees contend that they should be exempt from the requirement that they exhaust their administrative remedies because the special inquiry officer will not allow the section 1252(b) proceedings to address the issues raised in the complaint. Accordingly, it is contended that the facts that there is a pending petition for naturalization of Ms. Poulson's daughter and that the delay in its being acted upon is due to an unlawful deployment of personnel away from the processing of naturalization applications will not be able to be raised before and considered by the agency in connection with the deportation proceedings.

This is not accurate. While it is true that the issue of whether or not Ms. Poulson is deportable may not be affected by Ms. Small's present status as a permanent resident alien, nevertheless, the relationship between Ms. Small and Ms. Poulson and the pending petition for naturalization would be matters which may be raised in an application for discretionary relief such as temporary suspension of deportation before the special inquiry officer in connection with or incident to the section 1252(b) proceedings. See, *e.g.*, *Foti* v. *INS*, *supra*, 375 U.S. at 229, 236. Thus exhaustion should be required.

POINT VIII

The reasons for the issuance of a preliminary injunction must be stated.

Plaintiffs-appellees contend that the district court implicitedly found irreparable injury and likelihood of success on the merits to have been established. Rule 65(d), Fed. R. Cir. P., however, requires that the reasons for the issuance of any injunction or restraining order must be set forth in the order. See, *e.g.*, *Marshall* v. *United States*, 414 U.S. 473, 475-76 (1974). This is especially important in this case because plaintiffs'-appellees' papers in support of the injunction and those in opposition to the motion for dismissal did not even attempt to establish likelihood of success on the merits or irreparable injury *pendente lite*. Sustaining the injunction upon the assumption that likelihood of success on the merits and irreparable injury have been adequately established would, of course, render a sham of the requirements of Rule 65 and deny defendants-appellants of a fair hearing and a rational review of the matter. Even the Government is entitled to know why it is being restrained from enforcing the law.

CONCLUSION

For the reasons stated herein and in the Brief of Defendants-Appellants, the Court should vacate the preliminary injunction and dismiss the complaint.

Dated: Brooklyn, New York
January 12, 1977

Respectfully submitted,

DAVID G. TRAGER,
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Eastern District of New York.

ALVIN A. SCHALL,
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Of Counsel.

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK] ss

Joanne Bracco being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of January 1977 he served a copy of the within

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

by placing the same in a properly postpaid franked envelope addressed to:

Leon Rosen
60 E. 42nd Street
New York, N.Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

17th day of January 1977

Carolyn N. Johnson

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